85-1613

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE I, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether an attorney of the Antitrust Division of the Department of Justice who has properly had access to grand jury materials while conducting a criminal investigation may use the same materials in preparing for and litigating a related civil case without obtaining a disclosure order pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.

2. Whether the district court acted within its discretion when it issued a Rule 6(e) order authorizing the Antitrust Division to disclose certain grand jury materials to attorneys in the Civil Division and the United States Attorney's Office in order to obtain their advice and ensure consistent federal enforcement of the False Claims Act, a federal statute as to which the Civil Division has the primary enforcement responsibility.

PARTIES TO THE PROCEEDING

Respondents are three corporations—John Does, Inc. I, II, and III, respectively—that are defendants in *United States* v. *"A" Corp.*, 85-Civ.-2062 (S.D.N.Y.), a civil case filed under seal, and five individuals—John Does I, II, III, IV, and V, respectively—who are officers or employees of those corporations but are not defendants in the civil case.[1]

[1] Because of the grand jury secrecy issues involved in this case, both the district court and the court of appeals ordered that the civil complaint filed by the government be kept under seal (C.A. App. 76-77, 78; App., *infra*, 20a).

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 774 F.2d 34. An earlier order entered by the court of appeals (App., *infra*, 19a-20a) is unreported. The orders of the district court (App., *infra*, 21a, 22a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1985. A petition for rehearing was denied on December 2, 1985 (App., *infra*, 24a). On February 25, 1986, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including April 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 6(e) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

Recording and Disclosure of Proceedings.

* * * * *

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel * * * as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such

attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made * * *.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

* * * * *

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT

This case arises out of a federal grand jury investigation into bid rigging and price fixing by American companies in connection with government-financed sales of tallow to a foreign government.[2] The grand jury did not return an indictment, but following a subsequent civil investigation by the same government attorneys as were involved in the grand jury investigations, the United States filed (under seal) a civil complaint charging three of the respondents and one other company with violations of three federal statutes. App., *infra*, 2a-5a.

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[2] Tallow is an animal by-product used chiefly in the manufacture of soap, animal feed, and lubricants.

1. In November 1981, the Agency for International Development of the Department of State notified the Antitrust Division of the Department of Justice that conduct by American companies in connection with AID-financed sales of tallow to a foreign government might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. 1 *et seq.* Attorneys from the Antitrust Division conducted an investigation from March 1982 through early June 1984. In the course of the investigation, a grand jury in the Southern District of New York heard testimony from several dozen witnesses and received approximately 250,000 pages of subpoenaed documents (App., *infra*, 2a).

Early in June 1984, the Antitrust Division tentatively concluded that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. 1, but also decided that in the particular circumstances of this case a criminal prosecution was not appropriate. The grand jury investigation was promptly terminated without the return of an indictment. At the same time, however, the Antitrust Division concluded that a civil action against the corporate respondents might be appropriate.[3] Accordingly, the Assistant Attorney General in charge of the Antitrust Division instructed the same attorneys who had conducted the grand jury investigation to pursue a civil investigation of the matter and, if appropriate, to prepare a complaint for civil injunctive relief under the Sherman Act, and to consider a possible action for damages under the False Claims Act, 31 U.S.C. 3729-3731. App., *infra*, 2a.

Late in June 1984, pursuant to the Antitrust Civil Process Act (ACPA), 15 U.S.C. 1311-1314, the government issued civil investigative demands (CIDs) for documents to nearly two dozen persons, including the corporate

[3] The government may enforce the Sherman Act through both criminal prosecutions and civil suits. See 15 U.S.C. 1, 4, 15a.

respondents here, that had received grand jury subpoenas duces tecum. The scope of the CIDs overlapped that of the grand jury subpoenas, and the Antitrust Division notified the CID recipients that they could comply with the CIDs by certifying that all documents called for had been produced pursuant to the grand jury subpoenas. Nearly all recipients of CIDs complied in this manner, although two of the corporate respondents, while informally advising the Division that they had previously produced the documents sought, refused to sign certificates. In the course of the civil investigation, Antitrust Division attorneys also interviewed prospective witnesses and obtained documents from certain persons on a voluntary basis. App., *infra*, 2a-3a.

The Antitrust Division ultimately concluded that respondents' conduct violated the Sherman Act and might also be a violation of the False Claims Act. The Division then considered whether to bring a civil suit under both statutes. Although the Civil Division of the Department of Justice is charged with the primary responsibility for enforcing the False Claims Act (see 28 C.F.R. 0.45(d)), the Antitrust Division is authorized to prosecute False Claims Act suits if the conduct in question also violates the antitrust laws (see 28 C.F.R. 0.40(a)). To ensure consistency in the government's enforcement of the False Claims Act, the Antitrust Division sought advice from the Civil Division regarding the propriety of bringing a False Claims Act suit on the facts developed. Because venue for the proposed civil suits would lie in the Southern District of New York, the Antitrust Division also sought advice from the United States Attorney's office for that district.

The Antitrust and Civil Divisions then entered into preliminary discussions of the case that did not involve the disclosure of grand jury material (App., *infra*, 3a). However, the Civil Division indicated that it could not fully advise the Antitrust Division without a description of

certain information contained in the grand jury record. Accordingly, on November 30, 1984, the Antitrust Division sought an order, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, from the United States District Court for the Southern District of New York authorizing the disclosure of information contained in the grand jury record to four named attorneys in the Civil Division, two named attorneys in the United States Attorney's Office, and other attorneys of the Division or the Office designated by them. App., *infra*, 3a-4a. In a memorandum accompanying its motion, the Antitrust Division stated that the information sought to be disclosed "includes a description and analysis of the evidence * * * uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury" (C.A. App. 7). The Division stated that it believed its need to disclose the grand jury materials to these government attorneys for the limited purpose of consultation to ensure consistent enforcement of federal civil law outweighed the need for continued secrecy from these attorneys (*id.* at 10-11).[4] See also 11/29/84 Affidavit of

[4] As the memorandum explained (C.A. App. 10-11):

> The disclosure of information is necessary to ensure the proper functioning of the decision-making process of the U.S. Department of Justice. In order properly to exercise its prosecutorial discretion, review of the memoranda by the Civil Division is necessary to ensure that the Department acts consistently in its enforcement efforts. The review is also important to ensure that prosecution of this matter would carry out Department policy regarding the False Claims Act. Moreover, without disclosure of this information, the Antitrust Division would not be able to take full advantage of the Civil Division's expertise in enforcing cases under the False Claims Act.
>
> Coordination between the Civil Division and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts if its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other divisions. This uniformity of enforcement is necessary not only to the Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

Anna Swerdel para. 9 at 16; C.A. App. 16. The Division made clear that the requested disclosure was "not for purposes of further investigation" by the Civil Division or the United States Attorney (C.A. App. 9). After an ex parte hearing, the district court entered a Rule 6(e) order permitting the Antitrust Division to disclose matters occurring before the grand jury to the six specified attorneys in the Civil Division and the United States Attorney's Office and their designees "to assist in the review of this matter provided that this information will be treated as confidential and its use will be limited solely to the purposes of this order" (App., *infra*, 23a; see *id.* at 4a).

In the following weeks, the Antitrust Division provided the specified government attorneys with four memoranda prepared by the Antitrust Division that analyzed and quoted from the documentary and testimonial evidence presented to the grand jury. Some subpoenaed documents were attached to these memoranda. After analyzing this information and discussing it with attorneys from the Antitrust Division, the Civil Division advised the Antitrust Division that a False Claims Act suit would be appropriate. App., *infra*, 4a.

2. Early in March 1985, the Antitrust Division informed the corporate respondents that it intended to file a civil complaint against them within two weeks (App., *infra*, 4a). On March 11, 1985, respondents moved in the United States District Court for the Southern District of New York for an order vacating the outstanding Rule 6(e)

order and prohibiting the government from using any material obtained by the grand jury in preparing, filing, or litigating the civil suit (C.A. App. 46-47; App., *infra*, 4a). After a hearing,[5] the district court denied the requested relief (*id.* at 4a, 21a). The court rejected respondents' argument that the government had failed to demonstrate a particularized need for the Rule 6(e) order. The district court stated at a hearing on respondents' motion, "[t]he entire impact of the papers [the government] submitted was to show there was a particularized need. * * * [Government counsel] went through a great deal of trouble to indicate why they were necessary * * * (C.A. App. 66). The district court also denied respondents' motion to enjoin the government from filing its complaint and to disqualify the Antitrust Division attorneys who had participated in the grand jury investigation from participating in the civil suit, "without prejudice to [its] renewal before the trial judge * * * assigned when [the] case is filed" (App., *infra*, 21a).[6] The district court ordered that the complaint be filed under seal to protect the defendants' privacy. C.A. App. 76-77, 78.

Shortly thereafter, the United States filed a civil complaint under seal in *United States* v. *"A" Corp.*, No. 85-Civ.-2062 (S.D.N.Y.), charging the three corporate repondents (and one company that is not a respondent) with: (1) bid rigging and price fixing, in violation of

[5] Respondents' motion was originally assigned to Judge Brieant. After a hearing (C.A. App. 50-58), Judge Brieant denied the motion without prejudice, on the ground that it should be presented to Judge Palmieri, who had issued the Rule 6(e) order (C.A. App. 59). After a second hearing (*id.* at 60-78), Judge Palmieri denied respondent's motion, and it was his ruling that was later set aside by the court of appeals.

[6] The district court also concluded that it would be unfair to enjoin the filing of the complaint since the statute of limitations might run in the near future on some of these claims. C.A. App. 70-71.

Section 1 of the Sherman Act, 15 U.S.C. 1; (2) conspiring to defraud the United States, in violation of the False Claims Act, 31 U.S.C. 3729-3731; (3) making false claims against the United States, in violation of the Foreign Assistance Act of 1961, 22 U.S.C. 2399b; and (4) unjust enrichment at common law. The complaint contains no quotation from or reference to any grand jury transcript or any document subpoenaed by the grand jury, no mention of any witness before the grand jury, and no other mention (express or implied) of the existence or the workings of the grand jury. See App., *infra*, 5a.

3. The court of appeals reversed (App., *infra*, 1a-18a).[7] The court ruled that the district court's Rule 6(e) order should be vacated because the Antitrust Division had not demonstrated a particularized need for disclosure.[8] The court of appeals recognized that under *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), the district court was " 'infused with substantial discretion' " in deciding whether to authorize disclosure (App., *infra*, 6a (citation omitted)), and it acknowledged that the particularized need standard "is a highly flexible one" that accommodates considerations peculiar to the government " 'that weigh for or against disclosure in a given case' " (*id.* at 7a (citation omitted)). In particular, the court of appeals

[7] After filing a notice of appeal, respondents asked the court of appeals for a protective order prohibiting the government from using grand jury materials pending appeal in preparing, filing, or litigating the proposed civil action and prohibiting the Antitrust Division from making any further disclosure to the Civil Division. The court of appeals refused to prohibit the United States from filing its complaint, but directed that the complaint be filed under seal pending the resolution of respondents' appeal. App., *infra*, 19a. The court also prohibited the disclosure of grand jury material to anyone who was not already privy to the information (*id.* at 20a).

[8] However, the court of appeals rejected respondents' argument that the district court had erred by granting the order after an ex parte hearing pursuant to Fed. R. Crim. P. 6(e)(3)(D) (App., *infra*, 5a-6a).

noted (*id.* at 9a) that the reasons given in this case by the Antitrust Division for the disclosure of grand jury materials to the Civil Division "are perhaps more compelling on their face than those advanced" in *Sells* and *Illinois* v. *Abbott & Associates, Inc.*, 460 U.S. 557 (1983).

Nonetheless, the court of appeals concluded that the district court had improperly authorized disclosure because the Antitrust Division could have provided the Civil Division with "substantially the same information" by exercising its discovery powers under the ACPA (App., *infra*, 9a). The court acknowledged that this would entail "a certain amount of duplication" and would require the investment of "a substantial amount of additional government time and effort," but concluded that, under *Sells*, "such a factor can play no part in our analysis" (App., *infra*, 10a). Finally, despite the very narrow purpose for which disclosure was sought and permitted (see pages 6-7, *supra*), the court of appeals stated that the breadth of the district court's Rule 6(e) order "influenced" its assessment of the government's showing of particularized need (App., *infra*, 10a), since neither the government's request for disclosure nor the district court's Rule 6(e) order specified precisely what grand jury materials were to be revealed (App., *infra*, 11a). Accordingly, the court of appeals vacated the Rule 6(e) order (App., *infra*, 11a).

The court then turned to the question whether the Antitrust Division attorneys who had conducted the grand jury investigation could, in preparing for and litigating the contemplated civil suits, use the grand jury materials that they had already seen without first obtaining a Rule 6(e) order (App., *infra*, 11a-17a).[9] The court noted that the "issue presented here is more subtle" than the one that was decided by this Court in *Sells*, in which the Court "expressly

[9] Rule 6(e)(3)(A)(i) provides that disclosure otherwise prohibited by Rule 6(e) may be made to "an attorney for the government for use in the performance of such attorney's duty." See page 2, *supra*.

left this question unresolved" (App., *infra*, 11a-12a). In particular, the court of appeals recognized that "[t]he threshold question is whether the continued access to grand jury materials by the attorneys who conducted the grand jury investigation—and worked with the materials during that time—constitutes 'disclosure' " for purposes of Rule 6(e) (App., *infra*, 12a). The court acknowledged that it "seems fictional at first glance" to characterize as "disclosure" the mere access by the same attorneys during a civil suit to the materials they had reviewed during the criminal investigation (*ibid.*). But the court concluded that this characterization was justified in this case because the sizeable volume of grand jury materials would invite the government attorneys to refresh their recollection by referring "repeatedly to the documents and transcripts of which they have prior knowledge and with which they may be partially familiar" (*ibid.*).

The court of appeals buttressed its conclusion by referring to the reasons stated in *Sells* for limiting access to grand jury materials. App., *infra*, 13a-17a. The court recognized that one of these concerns—the threat to the integrity of the grand jury from its potential manipulation as a civil investigative device (see *Sells*, 463 U.S. at 432-433)—"is largely absent in this case," since the Antitrust Division's extensive pre-complaint discovery powers under the ACPA eliminate any incentive to employ the grand jury process merely to obtain information for use in a civil suit (App., *infra*, 13a-14a).[10] For the same reason,

[10] Under the ACPA, the Attorney General or the Assistant Attorney General for the Antitrust Division, before a civil complaint is filed, may require "any person" to produce documentary material, give written answers to interrogatories, provide oral testimony, or furnish any combination of the above, whenever he has reason to believe that this information is relevant to a civil antitrust investigation. 15 U.S.C. 1312(a); see *Associated Container Transp. (Australia) Ltd.* v. *United States*, 705 F.2d 53, 58 (2d Cir. 1983). The court of appeals recognized (App., *infra*, 9a) that this power should be broadly construed. See *Associated Container*, 705 F.2d at 58.

the court of appeals acknowledged that a second concern identified in *Sells*—that the automatic disclosure of grand jury materials would subvert the limitation on a party's discovery powers (see 463 U.S. at 433)—also had little force here (App., *infra*, 14a-15a).

However, the court of appeals concluded that the general secrecy concerns discussed in *Sells*—such as the risk of an illegal or inadvertent disclosure and the chilling effect of that risk on a witness's willingness to testify freely before the grand jury (see 463 U.S. at 432)—did apply here (App., *infra*, 15a-17a). The court stated that continued access by the attorneys who handled the grand jury investigation would involve only "limited" disclosure. But the court assumed that the continuing access by the attorneys would involve additional exposure of grand jury materials to secretaries and paralegals assisting the attorneys and that this would constitute a harmful, additional "disclosure" in contravention of Rule 6(e), even though those secretaries and paralegals may have previously seen the same material during the course of the grand jury's investigation (App., *infra*, 15a-16a).[11] The court also stated that continued access to grand jury materials by the attorneys who appeared before the grand jury would tend to discourage grand jury witnesses from speaking candidly (*id.* at 16a). The court conceded that the "threat of affirmative mischief" was " somewhat less than that present in *Sells*" (*ibid.*), if not "minimal" (*id.* at 17a), and confessed that it was "tempted" to conclude that the Antitrust Division attorneys need not obtain a Rule 6(e) order in these circumstances (App., *infra*, 16a-17a). But

[11] The court of appeals stated that this was a substantial problem because "it seems probable" that new support personnel might be needed to work on the civil case and because disclosure to secretaries and paralegals, "even if not in itself in violation of [Rule 6(e)], would increase the risk of inadvertent disclosure to nongovernment personnel" (App., *infra*, 16a).

the court nonetheless felt obliged to rule in respondents' favor because of "the reluctance imposed on us from above" (*id.* at 17a).

Finally, the court of appeals rejected respondents' claim that the mere filing of the government's civil complaint, which "does not quote from or refer to any grand jury materials," was itself an unauthorized "disclosure" of grand jury material (App., *infra*, 17a). The court therefore granted respondents' request for relief "only to the extent that we prohibit any further access to or use of grand jury materials by the [government] in the pending civil action, unless and until" the government obtains a Rule 6(e) order (App., *infra*, 17a).[12]

REASONS FOR GRANTING THE PETITION

This case presents two related questions of substantial practical importance to the government's ability to enforce federal law in civil litigation. In *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), the Court held that grand jury materials may not be disclosed, for use in civil litigation, to attorneys of the Department of Justice who had no part in the grand jury investigation, unless the government makes the showing of particularized need required by Fed. R. Crim. P. 6(e)(3)(C)(i) and obtains a court order authorizing such disclosure. The Court expressly declined to address "any issue concerning continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the

[12] Respondents did not contend that an attorney who participated in the grand jury proceedings may not rely on his recollection of the information learned by the grand jury in those proceedings in the litigation of a subsequent civil case (App., *infra*, 17a). Accordingly, the court of appeals expressly declined to consider that question (*ibid.*).

criminal proceeding." 463 U.S. at 431 n.15.[13] The court of appeals has now decided the issue reserved in *Sells*, ruling that the same government attorneys who conducted the grand jury proceeding must obtain a Rule 6(e) order before reviewing grand jury materials in connection with subsequent civil litigation. That ruling, which is contrary to the plain language of Rule 6(e) and is not justified by the legislative history of the Rule or by any of the concerns underlying this Court's ruling in *Sells*, will impose a significant additional burden on the Department of Justice in the conduct of civil litigation.

The court of appeals greatly exacerbated the adverse practical effect of its ruling by holding that the delay and expense involved in re-obtaining through other means the testimony and documents obtained by the grand jury can play "no part" in determining whether the government has shown the "particularized need" required by Rule 6(e). App., *infra*, 10a. This Court made clear in *Sells* that, in ruling on disclosure requests, district courts should take into account "any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case" (463 U.S. at 445). The government set forth compelling considerations in this case, but the court of appeals ruled, in effect, that the government cannot obtain a Rule 6(e) order authorizing any use of grand jury

[13] The Chief Justice, joined in dissent by Justices Powell, Rehnquist, and O'Connor, read the Court's decision as "allowing any Justice Department attorney who has participated in the grand jury investigation or prosecution—and thus already has had access to the grand jury materials—to make further use of those materials in preparing and litigating a related civil case" (463 U.S. at 473).

materials, no matter how valid or limited that use may be, if those materials could be re-obtained through other means, no matter how burdensome they may be.

The combined effect of these two rulings is that even where there is no additional dissemination of grand jury materials (*i.e.*, where they will be used by the same government attorneys) or where there is only a very limited additional dissemination for an important and wholly legitimate purpose that is unique to the federal government (*i.e.*, where the materials will be disclosed to government attorneys solely for purposes of consultation on government enforcement policy), the government must either re-acquire the same materials through costly and time-consuming alternatives or forego their use entirely. Because the decision below will require the government to squander scarce resources or forego the enforcement of valid civil claims but will not materially advance the secrecy objectives underlying this Court's decision in *Sells*, review by this Court is warranted despite the absence of a conflict among the circuits.

1. a. The Antitrust Division, the Civil Division, and many U.S. Attorney's offices often use the same attorneys in successive, related criminal and civil investigations. Both before and since this Court's decision in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), it has been the understanding of the Department of Justice that, if the decision is made not to seek an indictment and the same attorneys are used, these attorneys may review the grand jury materials, to which they have already had access, during the course of subsequent investigation and preparation for a civil suit. The Second Circuit's ruling, which now forbids that practice in that circuit, will mean that some important litigation will be needlessly expensive and some will not be brought at all.

Conducting a duplicate civil investigation after the completion of a criminal investigation will often require substantial additional time. This is particularly true in complex antitrust cases because of the volume of documents and testimony that must be collected and analyzed. In order to avoid problems of staleness or the running of the statute of limitations, the Antitrust Division may be forced to conduct simultaneous but separate criminal and civil investigations whenever there is a realistic possibility that civil litigation will ensue.[14] The cost of that course to the government, including the depletion of scarce attorney resources, would be substantial. As Chief Justice Burger observed in *Sells*, that cost is a matter of serious public concern (463 U.S. at 469-470 (dissenting opinion)). In some cases, otherwise appropriate civil litigation in the Second Circuit may not be pursued at all, because the Antitrust Division lacks the resources necessary to engage in double staffing or could not predict at the outset that a simultaneous separate civil investigation would be a prudent use of the Division's resources.[15]

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[14] The court of appeals' ruling does not prohibit the same attorneys from conducting successive criminal and civil investigations. (The court stated that since respondents had not contended that the attorneys who conduct a criminal investigation are, *ipso facto*, disqualified from litigating the civil case, the court would not address that question (App., *infra*, 17a).) But even where time permits this course, (a) successive investigations may be almost as wasteful of attorney resources as double staffing, and (b) the attorneys may be challenged repeatedly in the civil proceedings to establish that they did not make improper use of grand jury materials to which they once had access.

[15] The Second Circuit's ruling creates uncertainty that will influence the Department's activities elsewhere. The Antitrust Division's field offices and many of the United States Attorneys' offices in other circuits are small and generally use the same attorneys in both criminal and civil cases. These offices may be forced to alter this practice in important cases to avoid the risk of being found to have violated Rule 6(e).

The major changes in the Division's longstanding practice that would be required in the Second Circuit by the court of appeals' interpretation of Rule 6(e) and the wholly unjustified new burden that this decision would place on the government's ability to enforce federal civil law warrant this Court's intervention.

b. The court of appeals recognized (App., *infra*, 12a) that this case presents the question, reserved in *Sells*, whether the use of grand jury materials by the same attorneys who participated in the grand jury's investigation constitutes a "disclosure" within the meaning of Rule 6(e). The common meaning of that word, which is not defined in the Rule, would only forbid dissemination of grand jury materials to a person who has not previously seen them. The word "disclose" means to reveal (*Webster's Third New International Dictionary* 645 (1976 ed.)), and no revelation occurs when, as here, the attorneys who participated in a grand jury investigation review the same materials that were properly obtained by the grand jury during the course of its investigation.

The court of appeals agreed that calling such review a "disclosure" "seems fictional at first glance" (App., *infra*, 12a). But the court nonetheless reasoned that, since the amount of grand jury materials in this case was too great for any person to commit to memory, the attorneys preparing the civil suit would need to refer to at least some of these materials, and concluded that "any resort to th[o]se materials by the[se] attorneys * * * to refresh their recollection * * * is tantamount to a further disclosure" (*ibid.*). That construction of the term "disclosure" is highly artificial.[16] As the Eighth Circuit recently held,

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[16] The only authority cited by the court of appeals was the statement in the Ninth Circuit's opinion in *Sells* that " '[e]ach day this order remains effective the veil of secrecy is lifted higher * * * by the continued access of those to whom the materials have already been disclosed.' " App., *infra*, 12a-13a (asterisks in original) (quoting *In re*

"[f]or there to be a disclosure [under Rule 6(e)], grand jury matters must be disclosed to *someone*" (*United States* v. *Archer-Daniels-Midland Co.*, No. 85-1050 (Feb. 24, 1986), slip op. 12 (emphasis in original)), and it is entirely unrealistic to construe the investigating attorneys' re-examination of these materials as a "disclosure" to themselves.

c. The legislative history of Rule 6(e) also does not indicate that the drafters of the Rule or Congress intended to forbid the longstanding practice followed by the Department of Justice. Neither the advisory committee notes to the original version of Rule 6(e) or to its amendments nor the legislative history of the 1977 congressional revisions of the Rule contain any hint that an attorney who participated in the grand jury investigation may not refer to the grand jury materials during the course of a subsequent civil suit. See 18 U.S.C. App. at 567-572; S. Rep. 95-354, 95th Cong., 1st Sess. (1977); H.R. Rep. 95-195, 95th Cong., 1st Sess. (1977). Indeed, to the extent that the legislative history touches on this matter, it suggests that the Department's practice is consistent with the purposes underlying the Rule. As the Court pointed out in *Sells*, "[t]he draftsmen of the original Rule 6 provided that, in certain circumstances, government attorneys were entitled to obtain automatic access to grand jury materials " 'inasmuch as they may be present in the grand jury room

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Grand Jury Investigation No. 78-184 (Sells, Inc.), 642 F.2d 1184, 1188 (1981), aff'd, 463 U.S. 418 (1983)). But the Ninth Circuit was making an entirely different point. In *Sells*, the government attorneys who handled the grand jury investigation physically handed over—and therefore clearly "disclosed"—grand jury materials to Civil Division attorneys who had not appeared before the grand jury. The Ninth Circuit did not purport to define "disclosure"; rather, the passage quoted by the court below responded to the government's argument that the question whether a Rule 6(e) order was required was moot, since the transfer had already taken place. See 463 U.S. at 422 n.6.

during the presentation of evidence.' " 463 U.S. at 428 (quoting Fed. R. Crim. P. 6(e) advisory committee note, 18 U.S.C. (1976 ed.) App. at 1411). The advisory committee's notes to the original Rule 6(e) therefore suggest that the subsequent review of grand jury materials by those attorneys (and their supervisors) who either did appear or were entitled to appear before the grand jury presents no secrecy concern.

d. The court of appeals' definition of "disclosure" also does not materially further the purpose of the Rule, which is to minimize the dissemination of grand jury materials. Attorneys who participated in the grand jury proceedings are already aware of the subject matter and content of the grand jury materials. It can hardly be suggested that their reliance on their own memories of those materials in preparing for and litigating a civil suit or in shaping the course of civil discovery involves a "disclosure." See *Archer-Daniels-Midland*, slip op. 12 ("[w]e do not believe that an attorney's recollection of facts learned from his prior grand jury participation can be considered [a] disclosure" within the meaning of Rule 6(e)). And there is no virtue in requiring an attorney to rely on his possibly inaccurate memory when documents are available. Cf. *United States* v. *Jacobsen*, 466 U.S. 109, 119 (1984) ("avoiding the risk of a flaw in the employees' recollection * * * hardly enhances any legitimate privacy interest").[17]

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[17] Nor does this Court's decision in *Sells* support the court of appeals' ruling. There, one group of attorneys physically handed over grand jury transcripts and documents to other attorneys who had not been involved in the grand jury proceeding (463 U.S. at 420-422), so there clearly was a "disclosure." (By contrast, in this case the only disclosure of grand jury materials was by the Antitrust Division to the Civil Division solely for consultation and pursuant to a Rule 6(e) order.) As noted above, the Court in *Sells* therefore expressly declined to resolve the question presented in this case. 463 U.S. at 431 n.15.

In *Sells*, the Court identified three reasons for the reading of Rule 6(e) adopted in that case (463 U.S. at 431-434).[18] The court of appeals recognized that two of those concerns—the risk of misuse of the grand jury for the purposes of uncovering evidence for a civil suit, and the risk of circumvention of the limitations imposed on the government's civil discovery powers—do not exist in the present case because of the Antitrust Division's broad pre-complaint discovery powers under the ACPA (App., *infra,* 13a-15a; see also page 11 note 10, *supra).*[19] But the court of appeals thought that the Court's remaining concern in *Sells*—the consequences of dissemination itself—was applicable here (App., *infra,* 15a, citing *Sells,* 463 U.S. at 431). The court of appeals identified only two reasons for such concern, and neither one supports its decision.

i. First, although the court of appeals acknowledged that permitting the same attorneys to use grand jury materials poses no significant problem, the court believed—citing Rule 6(e)(3)(A)(ii)[20]—that access by secretaries and paralegals would pose a "significant" additional risk of "illegal or inadvertent disclosure" (App., *infra,* 15a). This conclusion is wrong. In the analogous

[18] The secrecy of grand jury proceedings is also justified on other grounds not relevant here. See *Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. 211, 219 (1979); *United States* v. *Procter & Gamble Co.,* 356 U.S. at 681-682 n.6.

[19] Respondents have never suggested that the grand jury proceedings were not conducted for entirely bona fide criminal investigative purposes. Any such allegation in another case could be dealt with on its merits.

[20] Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by Rule 6(e) may be made to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." See page 2, *supra.*

situation of the attorney-client privilege, the attorney's secretary and support staff are considered to be extensions of the attorney, and communication of a client's confidences to such persons does not destroy the privilege.[21] Moreover, the court of appeals misconstrued Rule 6(e)(3)(A)(ii). The congressional reports and advisory committee notes to that provision show that it was adopted to permit attorneys to reveal grand jury materials to assistants such as auditors, investigators, or attorneys from federal agencies;[22] there is no hint in the legislative history that the provision was necessary or designed to permit an attorney's secretary or paralegal to have access to grand jury materials.[23] In fact, *Sells* itself appeared to recognize that the disclosure to an attorney permits secretaries and paralegals to use grand jury materials when necessary. See 463 U.S. at 420.[24]

[21] See, *e.g., United States* v. *Kovel,* 296 F.2d 918, 921 (2d Cir. 1986); *Burlington Industries* v. *Exxon Corp.,* 65 F.R.D. 26, 40 (D. Md. 1974); *Zenith Radio Corp.* v. *RCA,* 121 F. Supp. 792, 794 (D Del. 1974); 2 D. Louisell & C. Mueller, *Federal Evidence* § 209, at 754 (1985); C. McCormick, *Evidence* § 91, at 218 (3d ed. 1984); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 503 (a)(3)[01], at 503-524 (1985); 8 J. Wigmore, *Evidence in Trials at Common Law* § 2301, at 583 (J. McNaughton rev. ed. 1961).

[22] See 18 U.S.C. App. at 568, 569-570; S. Rep. 95-354, *supra,* at 6-7; H.R. Rep. 95-195, *supra,* at 3-4.

[23] In *Sells,* this Court commented that the 1977 amendment was necessary "because Justice Department attorneys found that they often needed active assistance from *outside* personnel—not only investigators from the Federal Bureau of Investigation, IRS, and other law enforcement agencies, but also accountants, handwriting experts, and other persons with special skills" (463 U.S. at 436 (emphasis added)).

[24] As the Court stated (463 U.S. at 420 (emphasis added)): "The question in this case is under what conditions attorneys for the Civil Division of the Justice Department, *their paralegal and secretarial staff,* and all other necessary assistants, may obtain access to grand jury materials * * *."

ii. Second, the court of appeals thought that any use of grand jury materials in civil proceedings would make grand jury witnesses less willing to testify freely and candidly (App., *infra,* 16a). But the Second Circuit itself recently observed that, since the 1970 amendment to the Jencks Act, 18 U.S.C. 3500(e)(2), made the release of grand jury testimony "a frequent occurrence * * * [e]very sophisticated grand jury witness" "knows that, if he becomes a witness at trial, his grand jury testimony will most likely be revealed to the public. For future witnesses trying to decide whether to testify before grand juries, the marginal deterrent effect" of limited disclosure in any particular case "can only be trivial." *Executive Securities Corp.* v. *Doe,* 702 F.2d 406, 409-410 n.4 (2d Cir.), cert. denied, 464 U.S. 818 (1983).[25] In any event, this concern, by itself, is insufficient to overcome the straightforward meaning of the term "disclosure."

2. The court of appeals greatly exacerbated the adverse effect of the holding described above by also ruling that the burden of duplicate discovery is entitled to no weight in determining whether there is a "particularized need" justifying a Rule 6(e) order. Accordingly, because this aspect of that court's decision is closely related to the one discussed above, this Court should review that issue as well.

Rule 6(e)(3)(C)(i) provides that "[d]isclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made * * * when so directed by a

[25] Antitrust Division attorneys who conduct a grand jury investigation routinely inform witnesses that the grand jury is inquiring whether there has been a criminal violation of the Sherman Act. It is thus unlikely that witnesses who are testifying about possible criminal activity punishable by up to three years' imprisonment will be "chilled" merely by the prospect that their testimony might lead to a civil case being brought instead of or in addition to any criminal action.

court preliminarily to or in connection with a judicial proceeding * * *" upon a showing of particularized need.[26] In seeking authorization to disclose certain grand jury materials to the Civil Division for consultative purposes in this case, the Antitrust Division clearly made such a showing of particularized need, and the district court so held. The Antitrust Division needed the expert advice of the Civil Division in determining whether to file a civil suit under a statute for which the Civil Division has the primary federal enforcement responsibility.[27] Of course, the Antitrust Division attorneys who conducted the grand jury investigation and would prosecute the civil suit could determine whether respondents had violated the False Claims Act. But these attorneys could not be certain whether bringing suit under the Act on these facts would be consistent with the overall enforcement policy of the Department of Justice, as developed by the Civil Division. At the same time, the Civil Division could not offer the Antitrust Division meaningful guidance on the matter without knowing the particular facts of this case, and the Civil Division could not itself obtain the facts, since it lacks the Antitrust Division's pre-complaint discovery powers. See *Sells*, 463 U.S. at 433.

The court of appeals accepted all of this (App., *infra,* 7a-9a) but nevertheless concluded that the Antitrust Division had not demonstrated a particularized need for the grand jury materials because the Division could have reobtained relevant information pursuant to the ACPA (*id.* at 9a-11a). In essence, the court of appeals ruled that,

[26] That is, persons seeking such disclosure must show that "the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed" (*Douglas Oil Co.* v. *Petrol Stops Northwest,* 441 U.S. at 222 (footnote omitted)).

[27] Rule 6(e) orders can properly be obtained in aid of civil investigations. See, *e.g., United States* v. *Baggot,* 463 U.S. 476 (1983).

because the Antitrust Division *could* have duplicated much of the necessary information through the ACPA and then revealed it to the Civil Division (with citations to CID returns and depositions, rather than to grand jury documents and transcripts), the Antitrust Division was *obliged* to do so, rather than seek a disclosure order. The court acknowledged that this course would have entailed time-consuming duplication of effort (*id.* at 10a), but it ruled that such factors "can play no part in our analysis" (*ibid.*). That ruling is inconsistent with the Seventh Circuit's post-*Sells* application of Rule 6(e) in *In re Grand Jury Proceedings (Miller Brewing Co.)*, 717 F.2d 1136, 1138 (1983), which recognized that the time and expense of pursuing alternative discovery procedures may be considered when the government seeks a Rule 6(e) order.

Moreover, the court of appeals ultimately gave no weight to either the importance or the narrowness of the purpose for which the district court authorized disclosure. Under the district court's Rule 6(e) order (see App., *infra*, 23a), the Civil Division was not authorized to publish the materials or use them for its own purposes, but was limited to a consultative role in the False Claims Act portion of a lawsuit to be brought and litigated by the Antitrust Division. The court of appeals' failure to consider the nature of the disclosure is squarely at odds with this Court's ruling in *Sells* that courts should take into account "any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case." 463 U.S. at 445. The effect of the court of appeals' ruling here is to set a standard for disclosure when the government is the movant that is much stricter than the one that the Court contemplated in *Sells*. This standard would needlessly encumber the government's ability to enforce federal law, without making any material contribution to legitimate secrecy concerns. Accordingly, review of this aspect of the decison below is also warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1986

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1157—August Term, 1984

Docket No. 85-6054

IN RE: GRAND JURY INVESTIGATION.

JOHN DOES I, II, III, IV, V and
JOHN DOES, INC. I, II, and III,

Appellants,

—against—

UNITED STATES OF AMERICA,

Appellee.

(Argued: April 9, 1985 Decided: September 24, 1985)

Before:

KEARSE, PIERCE, and PRATT, *Circuit Judges.*

PRATT, *Circuit Judge*:

This is an appeal by five anonymous individuals and three anonymous corporations who were subjects of a grand jury investigation. After the investigation terminated without indictments, the Antitrust Division of the Department of Justice obtained an *ex parte* order under rule 6(e) of the Federal Rules of Criminal Procedure allowing disclosure of grand jury material to the civil division of the justice department and subsequently filed a civil complaint against the appellants. Appellants appeal

from the denial of their motion to vacate the rule 6(e) order and for protective relief preventing the antitrust division from using grand jury materials to litigate the civil action.

BACKGROUND

This appeal arises out of a federal grand jury investigation into bid-rigging and price-fixing by American companies in United States government-financed sales of a product to a foreign government. After notification by the Department of State that conduct by American companies engaged in these sales might warrant investigation for possible violations of the Sherman Act, 15 U.S.C. §§ 1 & 2, the Antitrust Division of the Department of Justice initiated a criminal investigation. During the investigation, a grand jury in the Southern District of New York heard the testimony of dozens of witnesses, including the individual appellants, and subpoenaed approximately 250,000 pages of documents, some of them documents from the corporate appellants.

In early June 1984 the antitrust division tentatively concluded that although appellants had violated § 1 of the Sherman Act, criminal prosecution was not warranted under the circumstances, and the grand jury dissolved without returning any indictments. Even though it had dropped the criminal investigation, the antitrust division concluded that a civil action might be appropriate. The same government attorneys in the antitrust division who had conducted the grand jury investigation were instructed to pursue a civil investigation and, if appropriate, to prepare a civil complaint.

In late June 1984 the United States issued civil investigative demands (CIDs) for documents, pursuant to the Antitrust Civil Process Act (ACPA), 15 U.S.C. § 1311-14, to approximately two dozen persons, including the corporate appellants here, from whom the grand jury

had subpoenaed documents. Since the scope of the CIDs overlapped that of the grand jury subpoenas, the antitrust division notified the CID recipients that they could comply with the CIDs by returning a certificate of compliance certifying that all documents called for by the CIDs had been produced pursuant to the grand jury subpoenas. While nearly all of the companies complied with this procedure, two of the three corporate appellants refused to sign the certificate of compliance, although the antitrust division advises that these two corporations informed the division informally that all documents sought in the CIDs had been produced pursuant to the subpoenas.

After further investigation the antitrust division determined that the appellants' conduct had violated both the Sherman act and the false claims act, 31 U.S.C. § 3729-31, and considered whether to bring its civil suit under both acts. Although the civil division of the justice department is charged with the primary duty of enforcing the false claims act, *see* 28 C.F.R. § 0.45(d), the antitrust division, as well, may bring such suits if the conduct in question also is alleged to violate the antitrust laws, *see* 28 C.F.R. § 0.40(a). In order to ensure "uniform and fair enforcement" of the false claims act, the antitrust division determined that it needed advice from the civil division as to whether, under the circumstances, a false claims action was warranted. The antitrust division also decided that in view of the venue of the action, it needed to secure similar advice from the office of the United States Attorney for the Southern District of New York.

The civil and antitrust divisions entered into preliminary discussions that did not involve disclosure of grand jury material. When the civil division indicated that it could not give the requested advice without access to certain grand jury materials, the antitrust division filed its *ex parte* motion, under seal, for an order pursuant to rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure

permitting disclosure of certain matters that had occurred before the grand jury to both the civil division and the southern district United States Attorney's office.

After a hearing, Judge Palmieri entered a rule 6(e) order permitting "matters occurring before the grand jury" to be disclosed to specified attorneys or their designees in the two offices "provided that this information [would] be treated as confidential and its use [would] be limited solely to the purposes of this order."

The antitrust division subsequently prepared and provided the designated attorneys with four factual memoranda that analyzed and quoted from documentary and testimonial evidence presented to the grand jury. Some subpoenaed documents were attached to the memoranda. After reviewing this information, the civil division advised the antitrust division that a suit under the false claims act would be appropriate.

In early March 1985 the antitrust division notified appellants that it would file a civil complaint against them within two weeks. Appellants immediately moved in the district court to vacate the rule 6(e) order and for a protective order "prohibiting the use of grand jury material obtained in the * * * investigation in preparing, filing or litigating the civil action contemplated by the Antitrust Division". After a hearing, Judge Palmieri denied the requested relief.

After filing a notice of appeal, appellants moved in this court to prohibit any further disclosure or use of the grand jury material pending resolution of the appeal. We denied the requested interim relief, but ordered that the appeal be expedited and that the anticipated complaint be sealed upon its filing in the district court. We also prohibited any disclosure of grand jury material to anyone not already privy to the information.

The complaint then filed under seal by the government does not quote from or refer to any grand jury transcripts or documents subpoenaed by the grand jury, and does not mention any witnesses before the grand jury or even refer to the existence of a grand jury.

On appeal, the appellants contend that: (1) an *ex parte* proceeding on the rule 6(e) motion was improper; (2) the principle of grand jury secrecy requires vacatur of the rule 6(e) order; and (3) the antitrust division may not use grand jury materials to litigate this civil case in the absence of a rule 6(e) order permitting such use.

DISCUSSION

I. *The Rule 6(e) Order.*

A. The *Ex Parte* Hearing.

Appellants first argue that the district court should not have granted the rule 6(e) order *ex parte*, but instead should have given notice to the appellants and held an adversary hearing.

Prior to 1983, rule 6(e) contained no provision for *ex parte* hearings. Nevertheless, the senate report on the 1977 amendments to rule 6(e) stated that "[i]t is contemplated that the judicial hearing in connection with an application for a court order by the government under [rule 6(e)(3)(C)(i)] should be *ex parte* so as to preserve, to the maximum extent possible, grand jury secrecy." S. Rep. No. 354, 95th Cong., 1st Sess. 8, *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 532.

Rule 6(e)(3)(D), which took effect in 1983, explicitly provides that a petition for disclosure made pursuant to rule 6(e)(3)(C)(i) may be made *ex parte* "when the petitioner is the government". The Advisory Committee note on the 1983 amendment to rule 6(e)(3)(D) points out that "the rule provides only that the hearing 'may' be *ex parte*

when the petitioner is the government", thus allowing the court to decide the matter "based upon the circumstances of the particular case."

Appellants contend that an adversary hearing would not have jeopardized grand jury secrecy since they were fully aware of the concluded grand jury investigation at the time of the government's request and nothing that was presented to the court *ex parte* was unknown to them. The government argues, however, that the facts sought to be disclosed were such that any meaningful discussion at an adversary hearing would have disclosed to the appellants the grand jury testimony and documents of parties other than the appellants. The government also notes that since the appellants included eight different persons, the court would have had to devise a procedure by which the grand jury testimony and documents of each appellant were shielded from every other appellant. In view of these circumstances, the district court did not abuse its discretion here by resolving the matter *ex parte*.

B. The Propriety of the Rule 6(e) Order.

Appellants next argue that the order should be vacated both because the antitrust division did not demonstrate the particularized need required to authorize disclosure and because the disclosure authorized by the order was too broad.

Under rule 6(e)(3)(C)(i), a district court "is infused with substantial discretion" to order disclosure of grand jury testimony preliminarily to or in connection with a judicial proceeding. *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979). The Court has construed the rule, however, "to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *United States* v. *Sells Engineering, Inc.*, 103 S.Ct. 3133, 3148 (1983). " '[D]isclosure is appropriate only in those cases where the

need for it outweighs the public interest in secrecy * * *' ". *Id.* (quoting *Douglas Oil Co.*, 441 U.S. at 223).

The particularized need standard governs disclosure to the government as well as to private parties. *Id.* Nevertheless, a court need not pretend "that there are no differences between governmental bodies and private parties." *Id.* at 3149. The particularized need standard is a highly flexible one, and may accommodate "relevant considerations, peculiar to government movants, that weigh for or against disclosure in a given case." *Id.*

For example, disclosure to another division of the justice department probably poses "less risk of further leakage or improper use than would disclosure to private parties or the general public." *Id.* Further, since the grand jury investigation had terminated in this case at the time the antitrust division sought disclosure, some of the policies underlying grand jury secrecy—such as a fear that someone might attempt to corrupt witnesses or grand jurors—were no longer applicable. *See Douglas Oil Co.*, 441 U.S. at 219.

Nevertheless, even though these factors may weigh in favor of disclosure, the government must still make a threshold showing of particularized need. Judge Palmieri's order does not state that the antitrust division had made that showing, although he later stated, at the hearing on the motion to vacate the *ex parte* motion, that "the entire impact of the papers [the antitrust division] submitted were to show there was a particularized need", and that the government "went through a great deal of trouble to indicate why" they needed the order.

In its motion papers the antitrust division asserted that disclosure to the civil divisions of the justice department and the United States Attorney's office was necessary "to ensure that the Department acts consistently in its enforcement efforts * * * [,] to ensure that prosecution of this matter would carry out Department policy regarding

the False Claims Act", and to allow the antitrust division "to take full advantage of the Civil Division's expertise in enforcing cases under the False Claims Act." The government elaborated that

> Coordination between the Civil Divisions and the Antitrust Division is necessary to ensure the fair and even-handed administration of justice. It would be more difficult for the Department to achieve consistency and uniformity in its enforcement efforts if its officials were unable to learn the facts of relevant matters being investigated by staff attorneys in other divisions. This uniformity of enforcement is necessary not only to the Department but to the public as well. Without uniform enforcement, the public would have difficulty rationally choosing courses of action which might be affected by the antitrust and the civil fraud laws.

In evaluating a claim of particularized need, the district court " 'may weigh the public interest, if any, served by disclosure to a governmental body' ". *Sells Engineering*, 103 S.Ct. at 3149 (quoting *Abbott & Associates, Inc.*, 103 S.Ct. 1356, 1362 n.15 (1983)). But the mere invocation of a "public interest" will not necessarily meet the heavy burden imposed by the particularized need standard. Thus, the government must do more than argue that disclosure is warranted because the grand jury materials sought are "rationally related to [a] civil fraud suit to be brought by the Civil Division", *id.*, or that such a suit is in furtherance of its "responsibility to protect the public weal", *id.* at 3148. Similarly, general goals such as "enhancing federal-state cooperation in antitrust enforcement, and encouraging more state lawsuits against price-fixers" are not sufficient to establish the requisite particularized need. *Illinois* v. *Abbott & Associates, Inc.*, 103 S.Ct. at 1364 (1983).

Here, the reasons advanced by the antitrust division for disclosure to the civil division are perhaps more compelling on their face than those advanced in *Sells* and *Abbott*. But their import is diminished by the fact that the antitrust division could have provided the civil division with substantially the same information, without resorting to the disclosure of grand jury material. *See Sells Engineering*, 103 S.Ct. at 3149 (district court might take into account the sufficiency of alternative discovery tools available to the agency seeking disclosure). The antitrust division has broad precomplaint *ex parte* discovery powers under the antitrust civil process act, 15 U.S.C. § 1311, that are similar in many respects to a grand jury's powers. For example, the antitrust division may

> request the production of any documentary material, answers to written interrogatories or oral testimony which it has reason to believe is relevant to a civil antitrust investigation * * *. Moreover, ACPA's legislative history indicates that the Justice Department is to be given wide latitude when issuing CID's. Although the permissible scope of CID provisions is governed by either the grand jury subpoena standard or the civil discovery standard, * * * the House report accompanying the 1976 amendments to ACPA reveals a preference for the less stringent grand jury subpoena standard * * *.

Associated Container Transportation (Australia) Ltd. v. *United States*, 705 F.2d 53, 58 (2d Cir. 1983) (citations and footnote omitted).

Although the civil division lacked these broader discovery powers, the antitrust division could have furnished the civil division with information gathered under the provisions of the ACPA. *See* 15 U.S.C. § 1313(c)(2) (authorizing disclosure of CID material to duly authorized employees of the Department of Justice).

The antitrust division asserts that access to CID materials alone would not have provided the civil division with sufficient information to ensure that a civil suit was appropriate, since the civil division needed to review the antitrust division's fact memoranda, which quoted extensively from grand jury transcripts. But given the antitrust division's ability under the ACPA to require oral testimony or answers to written interrogatories, it should have been able to construct equally illuminating fact memoranda without disclosing grand jury materials.

We recognize that requiring the antitrust division to ask the appellants for information through the ACPA, when the appellants have already produced that information in response to the grand jury subpoena, entails a certain amount of duplication. In some situations, however, all the antitrust division need do is reformulate subpoena requests into CIDs requesting production of the same material. In other cases, such as when the antitrust division seeks oral testimony duplicative of that given before the grand jury, a substantial amount of additional government time and effort may be required. But such a factor can play no part in our analysis. As stated by the Supreme Court in *Sells*:

> Of course, it would be of substantial help to a Justice Department civil attorney if he had free access to a storehouse of evidence compiled by a grand jury; but * * * [t]he civil lawyer's need is ordinarily nothing more than a matter of saving time and expense. * * * We have consistently rejected the argument that such savings can justify a breach of grand jury secrecy.

103 S.Ct. at 3142.

Our evaluation of the government's showing of particularized need is also influenced by the breadth of the court's order. The Supreme Court has "required that the showing of need for [grand jury material] be made 'with

particularity' so that 'the secrecy of the proceedings [may] be lifted discretely and limitedly.' " *Douglas Oil Co.*, 441 U.S. at 221 (quoting *United States* v. *Procter & Gamble Co.*, 356 U.S. 667, 683 (1958)). Here, the order simply provides that the antitrust division may disclose to the specified individuals "matters occurring before the grand jury". The government's motion papers are equally unrestricted. They request permission to disclose memoranda prepared by antitrust division attorneys, which include "a description and analysis of the evidence (both testimonial and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury." Although it appears from these papers that the government intends to disclose only part of the grand jury material, it is impossible to tell what part would be disclosed.

In short, the government did not meet its heavy burden of demonstrating a particularized need for the disclosure, and the district court should not have issued the rule 6(e) order. Although we cannot restore the secrecy that has already been lost, since the memoranda have already been presented to the civil division, we nevertheless vacate the order to prevent any further possible disclosure to the civil division.

II. *Use of the Grand Jury Materials in Civil Litigation.*

Appellants argue that the attorneys who conducted the grand jury investigation may not continue to use grand jury materials, without a rule 6(e) order, to litigate a civil case. The Supreme Court expressly left this question unresolved in *United States* v. *Sells Engineering, Inc.*, 103 S.Ct. 3133, 3141 n.15 (1983), where the Court rejected the government's argument that attorneys in the justice department's civil division, who had *not* conducted the

grand jury investigation, were entitled under rule 6(e)(3)(A)(i) to automatic disclosure of grand jury materials for use in preparing a civil suit against subjects of the grand jury investigation.

The issue presented here is more subtle. The threshold question is whether the continued access to grand jury materials by the attorneys who conducted the grand jury investigation—and worked with the materials during that time—even constitutes "disclosure". Assuming that only the two attorneys who actually worked on the grand jury investigation would have access to the grand jury materials in the civil phase of the dispute—when they will not be functioning as prosecutors—to characterize their continued access in the civil phase to the materials to which they had access in the criminal phase as disclosure within the meaning of rule 6(e) seems fictional at first glance. But the realities belie the apparent fiction. The testimony and documents here are voluminous, and we doubt that the two attorneys could independently recall the details of 250,000 pages of subpoenaed documents or the details of testimony by dozens of witnesses. Civil prosecution of the case would therefore invite them to refer repeatedly to the documents and transcripts of which they have prior knowledge and with which they may be partially familiar. Even when a criminal investigation has generated far fewer materials, any resort to these materials by the attorneys pursuing the civil matter to refresh their recollection as to documents or testimony to which they had access in the grand jury proceeding is tantamount to a further disclosure. Viewed in this context, to permit them continued access to the materials is equivalent to "disclosure". *See id.* at 3137 n.6 (approving *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184, 1187-88 (9th Cir. 1981) ("Each day this order remains

effective the veil of secrecy is lifted higher * * * by the continued access of those to whom the materials have already been disclosed.")).

That being so, the question then arises whether this type of disclosure requires a rule 6(e) order. Rule 6(e)(3)(A)(i) provides that disclosure otherwise prohibited by the provisions of rule 6(e) may be made to "an attorney for the government for use in the performance of such attorney's duty". While conceding that civil division attorneys fit within the definition of "attorney for the government"—as would the antitrust division attorneys here—the Court concluded in *Sells* that this subsection applied to the performance of the attorneys' duty to enforce the federal criminal law only and commented that disclosure for civil use without a rule 6(e) order was "unjustified by the considerations supporting prosecutorial access, [and] threaten[ed] to do affirmative mischief." *Sells Engineering, Inc.*, 103 S.Ct. at 3142.

The *Sells* Court required a rule 6(e) order because disclosure to government attorneys for civil use in that case presented three problems: (1) it threatened to undermine the integrity of the grand jury itself; (2) it threatened to subvert limitations imposed outside the grand jury context on the government's discovery powers; and (3) it raised many of the same concerns that underlie the rule of secrecy in other contexts. To determine whether a rule 6(e) order should be required in the present circumstances, we must analyze these three potential problems in the context of antitrust prosecutors who are seeking to proceed civilly.

1. Any possible threat to the integrity of the grand jury is largely absent in this case. In *Sells*, the Court reasoned that if prosecutors knew that their civil division colleagues would be free to use grand jury materials in a civil case, they might be tempted to manipulate the grand jury process to root out evidence for a civil case that would

be unnecessary in a criminal prosecution, or even to start a grand jury investigation where no criminal prosecution seemed likely.

This danger is substantially attenuated here in view of the antitrust division's extensive discovery powers under the antitrust civil process act, which the civil division lacked in *Sells*. The antitrust division would gain little by instigating a grand jury investigation for the purpose of gathering evidence for a civil proceeding, when it could gather that same information through its powers under the ACPA. Further, since a thoroughly prepared presentation to a grand jury in a criminal antitrust prosecution would probably uncover automatically most information that would be useful to a civil antitrust suit based on the same subject, there is little opportunity for the prosecutor to abuse grand jury investigations. And even though it is conceivable that some aspects of a civil case might require evidence different from what a prosecutor would seek for a criminal case, the prosecutor would also know that the antitrust division could seek this information through the ACPA if a civil suit were initiated. Under these circumstances, the threat to the integrity of the grand jury carries little weight.

2. The *Sells* Court's second concern was that automatic disclosure of grand jury materials threatened to subvert limitations on the government's powers of discovery and investigation that are applied outside the grand jury context. The Court commented that "[i]f government litigators or investigators in civil matters enjoyed unlimited access to grand jury material, * * * there would be little reason for them to resort to their usual, more limited avenues of investigation." *Id.* at 3143. Here, by contrast, the government's discovery powers under the ACPA are almost co-extensive with the grand jury's investigative powers.

We recognize that permitting the grand jury attorneys to use grand jury materials in a civil case would in effect give the government "exclusive access to a storehouse of relevant fact" which is closed to a civil defendant absent a showing of particularized need under rule 6(e). However, had the government collected the same information civilly under the ACPA, a similar limitation on the defendant's access would apply, for material obtained by the government under the ACPA may not be disclosed to third parties, other than duly authorized employees of the justice department, without the consent of the person who produced the material or from whom it was discovered. 15 U.S.C. § 1313(c)(3). Thus, we do not view either of the first two problems in *Sells* as reasons to require a rule 6(e) order here.

3. The Court's third concern in *Sells*, however, that disclosure to government bodies raises many of the same concerns that underlie the rule of grand jury secrecy in other contexts, carries significantly more weight in the circumstances of this case. First, in *Sells*, the Court noted that allowing automatic disclosure of grand jury materials to nonprosecutors for civil use increases the risk of illegal or inadvertent disclosure of such material to others. *Sells Engineering, Inc.*, 103 S.Ct. at 3142. If it only involved continued access by those antitrust division attorneys who actually carried out the grand jury investigation here, then the disclosure would admittedly be limited. But the risk of inadvertent or illegal disclosure arising from these attorneys' continuing access to the material is also significant. If the attorneys intend to use the testimony and documents in litigating the case, it borders on the unrealistic to assume that paralegal and secretarial staff and other necessary assistants would not also come into contact with the material. Indeed, counsel very likely have already used such assistants in preparing and releasing to the civil division the fact memoranda, memoranda

which contained "a description and analysis of the evidence (both testimonial and documentary) uncovered by the grand jury and excerpts from documents and testimony of witnesses who appeared before the grand jury." Even though these support employees may have worked on the grand jury investigation and previously seen the grand jury material, it is still being disclosed to them in the sense that they have continued access to it. But since disclosure to nonattorney government personnel is expressly limited to disclosure for the purpose of assisting "an attorney for the government in the performance of such attorney's duty to enforce federal *criminal* law", Fed. R. Crim. P. 6(e)(3)(A)(ii) (emphasis added), even such limited disclosure would contravene the statute. Moreover, given the long life and complexity of many civil antitrust actions, it seems probable that some new support personnel will need to work on some aspect of the case, due either to employee turnover or to increased staffing needs. Any attendant disclosure to those new employees would also contravene rule 6(e)(3)(A)(ii). Finally, any such disclosure, even if not in itself in violation of the statute, would increase the risk of inadvertent disclosure to nongovernment personnel.

Second, the Supreme Court was also concerned that routine, automatic disclosure would create a risk that a witness, who knew that his testimony could be used in civil litigation, might be less willing to speak candidly before the grand jury "for fear that he [would] get himself into trouble in some other forum." *Sells Engineering*, 103 S.Ct. at 3142. This concern applies with equal force to grand jury investigations by the antitrust division.

On balance, we think that the threat of affirmative mischief posed by the use of grand jury materials in this civil action is somewhat less than that present in *Sells*, and we might be tempted to conclude that the antitrust division need not seek a rule 6(e) order to use grand jury material

to litigate this civil action. But, however minimal the threat here, we are directed by the principle that "[i]n the absence of a clear indication in a statute or Rule, we must always be reluctant to conclude that a breach of [grand jury] secrecy has been authorized." *Sells Engineering*, 103 S.Ct. at 3138. Certainly, such a clear indication is lacking here. Consequently, the reluctance imposed on us from above forces us to reinforce the principle of grand jury secrecy and requires, through a rule 6(e) order, judicial supervision of access to grand jury material by the antitrust division in this civil action.

Since the complaint filed by the government does not quote from or refer to any grand jury material, and since the statute of limitations on at least one of the government's claims has apparently run, we grant the appellants' request for protective relief only to the extent that we prohibit any further access to or use of grand jury materials by the antitrust division in the pending civil action, unless and until the antitrust division obtains a rule 6(e) order based on an appropriate showing of "particularized need" for use of the material.

Appellants state that "this case does not present the more difficult question of whether a prosecutor who conducted the grand jury proceedings may merely use his recollection of facts from those proceedings to litigate a civil case." Since it would be almost impossible for any attorney in such a position to compartmentalize his thoughts and litigate a civil case without in some way using his recollection of facts learned during the grand jury investigation, we think that the real question is whether the prosecutor must be disqualified from litigating the civil case. Since appellants have expressly declined to present that issue, we are not called upon to address it.

CONCLUSION

We reverse the district court's denials of both the motion to vacate the rule 6(e) order and the motion to enjoin the antitrust division from any further access to or use of the grand jury materials in the civil action. We remand to the district court with a direction to grant both motions as indicated in this opinion, but without prejudice to a further application for a rule 6(e) order based on an appropriate demonstration of particularized need.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 85-8026

IN RE GRAND JURY INVESTIGATION (TALLOW)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of March, one thousand nine hundred and eighty five.

Present: Honorable IRVING R. KAUFMAN,
Honorable RICHARD J. CARDAMONE,
Circuit Judges,
Honorable CHARLES H. TENNEY,
District Judge, sitting by designation.

A motion having been made for a protective order pending appeal and an expedited appeal;

IT IS HEREBY ORDERED that the motion for a protective order prohibiting the United States from filing its complaint on March 15 1985 be denied. The appeal from the November 30, 1984 order, pursuant to Fed. R. Crim. P. 6(e), authorizing disclosure of grand jury materials to certain government attorneys, is expedited to the week of April 8, 1985; the Clerk's office shall enter an appropriate scheduling order.

IT IS FURTHER ORDERED that the complaint be sealed upon its filing with the Clerk of the district court, and until such time as the appeal from the Rule 6(e) order is decided by this Court. No party now privy to the contents of the complaint, the identities of the parties named as defendants therein, or any information derived from the grand jury proceedings used in preparing the complaint, shall disclose such material in any manner whatsoever to any person not now privy to such information. This prohibition shall remain in effect pending issuance of this Court's mandate in the appeal from the Rule 6(e) order.

SO ORDERED.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,

/s/ RICHARD J. CARDAMONE
Richard J. Cardamone,
Circuit Judges,

/s/ CHARLES H. TENNEY/JOS
Charles H. Tenney,
District Judge.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE GRAND JURY INVESTIGATION

APPLICATION FOR ORDER TO SHOW CAUSE AND PROTECTIVE ORDER PURSUANT TO RULE 6(e), FED. R. CRIM.P. and AFFIDAVIT

GRAND & OSTROW
641 Lexington Avenue
New York, N.Y. 10022
212-832-3611

Attorneys for Petitioners
JOHN DOE I, JOHN DOE II, JOHN DOE INC. I

Applications for vacatur and protective relief denied without prejudice to their renewal before the trial judge expected to be assigned when case is filed on March 15, 1985. See record of March 12, 1985.

SO ORDERED.

/s/ EDMUND L. PALMIERI
Edmund L. Palmieri
U.S.D.J.

March 12, 1985

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Misc. No. M 11-188

IN RE U.S. DEPARTMENT OF JUSTICE
CIVIL INVESTIGATION—TALLOW

ORDER OF JUDGE EDMUND PALMIERI, NOVEMBER 30, 1984

ORDER

On November 30, 1984, the U.S. Department of Justice filed a motion for disclosure under Federal Rule of Criminal Procedure 6(e) in reference to the above-captioned investigation.

Upon consideration of the memorandum and papers filed in this matter

IT IS ORDERED that the motion of the U.S. Department of Justice be granted and that matters occurring before the grand jury may be disclosed to.

Stuart E. Schiffer
Deputy Assistant Attorney General
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Michael F. Hertz, Director
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Robert L. Ashbaugh, Assistant Director
Commercial Litigation Branch
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U.S. Department of Justice

Howard Sribnick, Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice

Rudolph W. Giuliani
U.S. Attorney
Southern District of New York

Howard Wilson, Chief
Civil Division
U.S. Attorneys Office
Southern District of New York

or to any attorney of the Civil Division of the U.S. Department of Justice or the U.S. Attorneys Office for the Southern District of New York who may be designated by any of the afore-named attorneys to assist in the review of this matter provided that this information will be treated as confidential and its use will be limited solely to the purposes of this order.

IT IS FURTHER ORDERED that the Court shall be notified promptly of any such designation by means of a letter of disclosure to the Court.

IT IS FURTHER ORDERED that this Order and accompanying application be sealed until further order of the Court.

/s/ EDMUND L. PALMIERI
UNITED STATES DISTRICT JUDGE

Date: Nov. 30, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 85-6054

IN RE: GRAND JURY INVESTIGATION
JOHN DOE I, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 2nd day of December one thousand nine hundred and eighty-five.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellee, United States of America

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

U.S. GOVERNMENT PRINTING OFFICE: 1986—491-507/20167